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WHEN IS AN ACTION BEGUN SO AS TO STOP THE RUNNING OF THE STATUTE OF LIMITATIONS?

The question as to when an action is commenced so as to stop the running of the statute of limitations has been a source of much litigation and many statutes in the different states. In most of them statutes have been passed declaring when a suit is deemed to be commenced, and they may be classified as follows:

Those providing that the action is begun,

(1) When the complaint is filed.
(2) When the process is issued.
(3) When the process is served on the defendant.

The majority of the states follow the second class, which may be subdivided into two sets of legislations and adjudications,

(a) Those holding that the suit is commenced when the clerk fills out the writ or summons; and,
(b) Those holding that it is not commenced until the writ is delivered to the sheriff to be served.

The statute of Virginia is as follows:

"The process to commence a suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action. It shall be issued on the order of the plaintiff, his attorney or agent, and shall not, after it is issued, be altered, nor any blank therein filled up, except by the clerk." Code, § 3223.

Virginia, then, may be classified under the second main division given above, but further than this we cannot go. There has been no judicial construction of this statute made in this state, so its meaning is a matter for comment. Under the statute set out above, whenever the writ is "issued" the suit is begun and the statute of limitations stopped. But when is the writ "issued?" What is the meaning of the word? Is the action commenced by the clerk's filling out the summons, or is

it commenced by the delivery of the writ to the sheriff? It will be the object of this article to attempt to answer these questions by the citation of pertinent cases.

In an article in 8 Va. Law Reg. 624, on this subject, the author takes the position that the action is begun when the writ is filled out by the clerk. As the latter part of this paper is devoted to an analysis of the cases there cited, a discussion of the theory will not be gone into here.

In Furst Bros. *v.* Banks, 101 Va. 208, it is said:

"A common law action commenced by a summons is considered as instituted when the summons is issued for the purpose of having it executed."

This language is indefinite, and does not decide the vital point—when is the writ issued? However vague this sentence is, it is the nearest one to the point found among the reported cases in Virginia.

Let us get at the keynote of the section. It is the word "issued." What is its meaning, in the sense in which it is used by the legislature? It will be conceded that if "issued" be found to imply a delivery of the writ to the sheriff for execution, and not merely filling out thereof by the clerk, that the action will be held to commence when the writ is delivered to the sheriff.

It will appear, by an examination of authorities under statutes similar to ours, and of decisions construing the word "issued," that the majority of them hold that word, when used in this connection, to imply a delivery of the writ into the hands of the sheriff for service. Let us examine a few of these.

In Burdick *v.* Green, 18 Johns. 14, it was held that the issuing of the writ is the commencement of the suit, in all cases where the time is material; as, to save the statute of limitations. In commenting on this holding, Woodworth, J., in Ross *v.* Luther, 4 Cowan 158, 15 Am. Dec. 341, says:

"By this general proposition it is not intended that the mere filling up of the process is such commencement. The same case explains the rule that it is not necessary to show the writ was actually delivered to the sheriff; but it is sufficient if it appear that the writ was made out and sent to the sheriff or his deputy, by mail or otherwise, with a bona fide, absolute, and

unequivocal intention of having it served. The same doctrine is recognized in Vischer *v.* Gausewoort, 18 Johns. 496."

The case of Ross *v.* Luther is re-reported in 15 Am. Dec., by Mr. Freeman, and is made the basis of an extended note by him, in which he reviews the American cases on this question. He states in his conclusion, after such a review, that the doctrine laid down in this case is the general rule in the United States, except where it has been otherwise provided by statute.

It will be noticed, on a careful reading of these cases, that they are not mere dicta, either, but that they are directly in point. And an examination of the authorities will reveal the fact that they are leading cases. As they are important, perhaps a short analysis would not be out of place.

In Ross *v.* Luther, the reporter, in a statement of the case, says: "But the principal controversy was as to whether the prisoner was off the limits at the commencement of the suit." The time of the commencement of the action was the essence of the case. If the prisoner was off the limits, the sheriff was liable; if not, he was not liable. When, then, was the suit commenced. The question was squarely raised, decided by an undivided court, and has since been a leading case, cited, commented upon, and approved by the majority of the cases decided upon this point.

In Burdick *v.* Green, the question which arose was directly in point. If the action on the note was commenced on or before the 31st day of July, 1816, it was in time to save the statute; if not, the statute would bar recovery. The statute of limitations was one of the pleas entered by the defendant, and was discussed at length by the court. True, the evidence is not satisfactory as to the delivery of the writ to the sheriff, and the court, recognizing this, explains it by the suggestion of a probability of fraud on the part of the attorney for the plaintiff, in antedating the entry of his suit in his register. In summing up, the court says, "but we are of opinion that the defence was complete, under the plea of the statute of limitations. The note was due, and the whole cause of action arose August 1, 1810. There is no doubt as to the rule that the *issuing of the writ* is the commencement of the suit, in all cases where time is material. * * * We do not think that it was indispensably

necessary, in such cases, to prove an actual delivery of the writ to the sheriff, provided it be shown that is was actually made out and sent with a bona fide and absolute intention of having it served."

Judge Cooley, in Howell *v.* Shepard, 48 Mich. 472, said:

"The mere filling out of a summons, which is then left in the justice's office until return day, or which is taken by the plaintiff and retained in his own custody, is not the commencement of suit. The writ must not only be made out, but it must be issued with the intent that, if practicable, it shall be served."

This opinion, delivered as it is by the eminent judge, should be given great weight. The last sentence may be capable of two constructions. Does he mean that "made out" and "issued" refer to the same act, or does he mean "made out" in the sense of filling out, and "issued" in the sense of delivery to the sheriff? It seems that the latter is the most probable meaning. Otherwise, why did he use both words? Giving it this meaning, then, the sentence would read: "The writ must not only be made out, but it must *also* be issued with the intent that, if practicable, it shall be served," implying by the word "issued" something additional to be done after the writ is "made out." In fact, it seems that the last sentence, when read in connection with the first one, which is unequivocal, can be given no other meaning.

In Jackson *v.* Brooks, 14 Wend. 650, it is said:

"The suing out of the writ is undoubtedly the commencement of the suit; but the writ is not considered as legally sued out until it is delivered to the sheriff, with authority to him to serve it on the defendant, if he can be found within his bailiwick, or is placed in his office, or transmitted to him for the purpose of being served; although it is not absolutely necessary that it should have actually reached the hands of the sheriff."

The court holds, in Burton *v.* Delphlain, 25 Mo. App. 376, that, "the mere writ, lying in the clerk's office, in no officer's hands who could enforce it, ought not to be held the 'issuing' of an execution, within the meaning of the statute. An order or writ not sent out is not 'issued.'"

In Hancock *v.* Ritchie, 11 Ind. 48, it was said that, "*the mere making out* of a writ without actual or constructive delivery to the officer for service *was the same as if no writ had issued.*"

"The issuing of a summons is the commencement of an action, *but a summons is not issued until it comes to the hands of a sheriff.*" Fordice *v.* Hardesty, 36 Ind. 23.

In a late Indiana case, Ward et als. *v.* Bissell, 108 Ind. 229, 9 N. E. 425, the following statute was construed by Zollars, J.: "* * * and the action shall be deemed to be commenced from the time of issuing the summons." In his opinion, he said that, "the filing of the complaint, *and the issuing of the summons to the sheriff,* as heretofore ruled by this court, is the commencement of the action."

In Heckla Ins. Co. *v.* Schroeder, 9 Ill. App. 472, it was held that, "the *suing out* of a summons is the commencement of a suit, but a writ is not considered as legally sued out until it is delivered to the sheriff with authority to make service, or is transmitted to him for the purpose of being served. The mere making out, signing and sealing of a summons by the clerk, and delivery to the plaintiff, or his attorney, is not the commencement of the suit so as to save the bar of a limitation."

Bronson *v.* Earle, 17 Johns. 63, held that, "although there may be some uncertainty or ambiguity in the term 'suing out of the writ,' yet there can be no doubt, that the delivery of the writ to the proper officer, or leaving it at his house, as in this case, for the purpose of being executed, is to be deemed the actual commencement of the suit."

The Maine Court, in John *v.* Farwell, 22 Am. Dec. 203, said: "Chief Justice Kent held that the action is commenced at the time of suing out the writ, and that the good sense as well as the truth on the subject concurred that the writ *issues* when it is delivered to the sheriff or his deputy, or sent to either of them with a bona fide intention to be served upon the defendant."

In Pease *v.* Ritchie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566, in construing the word "issued" in a statute, which provided that a judgment should cease to be a lien on land at the end of a year after its rendition, unless an execution should be *issued* on it during that time, the court said:

"The statute *requires something more than the mere writing of an execution by the clerk, and placing it among the files in his office.* The word 'issued,' as used in the statute, has a more comprehensive meaning, and we think that the fair construction

of the word, as used in the statute, requires an execution to be made out, properly attested by the clerk, and delivered to the sheriff to be executed."

In the recent Alabama case of West *v.* Engle, 14 So. Rep. 333, it is said, by Harrison, J., delivering the opinion of the court:

"A summons may be signed by the clerk and dated, and allowed to lie dormant in his office until the next term, or he may hand it to the attorney for the defendant, and he may keep it in his possession, and never deliver it to the sheriff; and in neither case could the summons be said to have *issued*, or the suit commenced. * * * Our conclusion, therefore, from our own and other adjudged cases, is that a summons cannot be said to be sued out, under our statute, until it passes from the hands of the clerk to the sheriff, or other proper officer, to be executed, or sent by mail or otherwise, with a bona fide, unequivocal intention to have it served."

In the same case, the following language of Judge Peck, in Ex parte Locke, 46 Ala. 77, was quoted:

"The suing out of the writ is the commencement of the action. A writ cannot be said to be sued out until it passes from the hands of the clerk to the sheriff to be executed."

To the same effect is the case of Ry. Co. *v.* Harris, 25 Ala. 235.

In the comparatively recent North Carolina case of Webster *v.* Sharpe, 21 S. E. 912, where the language of the Code, that "an action is commenced by *issuing* a summons," is commented upon, it is said:

"This involves the question as to what is meant by the word '*issued,*' and we are of the opinion that it means *going out of the hands of the clerk,* expressed or implied, to be delivered to the sheriff for service. If the clerk delivers it to the sheriff to be served, it is then *issued;* or if the clerk delivers it to the plaintiff, or some one else, to be delivered by him to the sheriff, this is an issue of the summons. * * * This is done by the implied consent of the clerk, and in our opinion, constitutes an issuance from the time it is placed in the hands of the sheriff for service."

An instruction to this effect was given in the later case of Houston *v.* Thornton, 29 S. E. 827, which the Supreme Court of

North Carolina, in an opinion delivered by Judge Clark, held to be correct.

In McClure *v.* Fellows, 42 S. E. 951, another North Carolina case, the court goes further than this, and says that the *only* mode of issuing a summons is for it to be filled out by the clerk and delivered to the sheriff for service. As put in the syllabus to that case, "under Code * * * § 161, providing that an action is commenced when summons is issued, * * * the order, by the clerk, of the publication of the summons and notice of attachment, *and the actual publication thereof,* as required by §§ 219 and 352, do not give jurisdiction, *the summons having been merely filled out and not issued,* and issuance not having been waived."

Whether or not this extreme view is wrong is not within the scope of this article. Judge Clark, in a dissenting opinion in this case, contends that it is; but it will be noticed that he does not condemn the holding in the earlier North Carolina cases, to the effect that the summons is "issued," in cases where there is personal service, when it leaves the clerk's office to be handed to the sheriff. The cause of his dissent is found in the following words used by him:

"They (meaning the earlier North Carolina cases) do not hold that this is the *only* mode of 'issuance' of summons. On the contrary, when the service is to be by publication, the summons is issued when it leaves the clerk's office to be served in that way."

The holding of Webster *v.* Clarke, then, stands without a dissenting opinion opposing it.

The law on this point should not be confounded with the presumption arising from the date endorsed by the clerk on the process. As was said in Webster *v.* Clarke, *supra,* that "if the summons was issued at the time it bears date, it was in time. * * * The presumption is that it was issued at the time it bears date, and the burden is on the defendant to show that it did not."

The authorities holding this are numerous, and could be here cited, but there is no use of referring to them, because this is not the point in issue.

The case of Lynch *v.* New York, etc., Co., 30 Atl. 187, is of no

value on this question, for it comes within the exceptional cases, commented upon in 8 Va. Law Register 624. There the summons was signed, sealed and retained in the attorney's office, without any purpose of immediate service. Mention may be made of a quotation of the Chief Justice, however, in delivering the opinion of the court, from Whitaker *v.* Turnbull, 18 N. J. L. 174. which is as follows:

"When a writ is issued out of the office of the clerk, or if the attorney acting * * * as the agent or deputy of the clerk, * * * it is, for all material purposes, the actual commencement of the suit."

Note the language used, "issued *out of the office.*" This would seem to imply that he thought of issuing as a *sending out,* and not merely a *filling up,* thus bearing out the theory adopted by this paper.

In 8 Ency. Pl. & Prac. 433, speaking of an execution, it is said:

"The writ, *while it remains in the clerk's office,* is not issued, but it must be actually or constructively delivered to the sheriff, before it can be properly said to have been sued out, with intent to have the officer to execute it."

Let us now take up, in the order presented in the article in the VIRGINIA LAW REGISTER above referred to, an analysis of the cases there relied on.

The first one presented is Michigan Ins. Bank *v.* Eldred, 130 U. S. 693. In the first place, any expression used by Mr. Justice Gray in this opinion can be but mere dictum. The question presented is not a pertinent one in the construction of the word "issued." The case turns on the construction of a statute wholly different from ours, and the issue presented is whether or not the placing of the writs in the box, according to agreement with the sheriff, was a constructive delivery thereof to the sheriff.

In the second place, it is submitted, with deference, that the dictum in this case does not sustain the view for which it was cited. There are two parts of sentences which, when twisted around in a manner evidently not intended by the author, might lend color to this view, but, as gathered from a reading of the opinion as a whole, it is not the intended meaning of the court. The use of the word, "issued," in the sense contended for may

be explained by the clerk, who testified in the case under discussion, as follows: "It was our practice to put them (meaning the writs) there (in the box) the day the writ was *issued.*" It is clear that the clerk meant by "issued" a mere "filling out." It would have been only natural for the court to have thoughtlessly used this word in this sense in his opinion, after reading the evidence of a witness who used it in the same sense.

The next case is that of Louisville & N. R. Co. *v.* Smith's Adm'r, 9 S. W. 493. Here, again, we are confronted with dictum. Without going into a discussion of the language used, it will be enough to state that the question was whether or not the *alias* summons, or the original summons, was the beginning of the action. The original summons was issued before the year ran out, and the alias summons was issued more than a year from the cause of action. The question decided was similar to that in Va. Fire & Marine Ins. Co. *v.* Vaughan, 88 Va. 832, as to whether the suit should be deemed to have commenced on the issuance of the alias summons or the original summons, and can have no bearing on the question under discussion.

A discussion of the cases of Va. Fire & Marine Ins. Co. *v.* Vaughan, *supra,* and Noel *v.* Noel, 93 Va. 433, is unnecessary. The cases are not pertinent.

Lawrence *v.* Winefrede Coal Co. (W. Va.), 35 S. E. 925, was another case relied on. The point raised by counsel for defendant in that case was whether or not an action was commenced when the summons was issued but no declaration filed. Although there is some language of Judge Brannon on the question pertinent here, it does not seem that he meant to hold with a theory opposing the view taken by this article. His holding is doubtful. However, he closes his opinion with a sentence which looks very much as if he favored the contention here made. It is as follows: "The authorities generally say that in the United States, the suing out of the writ is the commencement of the suit, its date being *prima facie* evidence of the true date, *though not conclusive.*" At all events, this cannot be construed as being antagonistic to our theory. If the date of the writ is only *prima facie* the date of the issuance of it, then the *true* date of the issuance may be some other time, and the suit being commenced when the writ is issued, the true

date of the commencement of the action is not necessarily the date filled in by the clerk. See, also, on this point Webster *v.* Sharpe, *supra.*

In the case of Lawrence *v.* Winefrede Coal Co., *supra,* Lambert *v.* Ensign M'f'g Co. (W. Va.), 26 S. E. 431, and United States Blowpipe Co. *v.* Spencer (W. Va.), 33 S. E. 342, were cited as having decided the point contended for in the opinion of the court. Very good, but let us see what the points decided in these two cases were.

In the first one, the only matter pertaining to this was to the effect that the date of the writ is not conclusive but *prima facie* evidence of the commencement of the action. This language has been commented upon before, and found to be favorable to our contention.

In the second case, there are two opinions, one being that of the court, and one dissenting therefrom by Judge English. Brannon, J., delivering the first opinion, says:

"I must assert that, upon a review of authorities, the issuance of the writ, generally speaking, is the beginning of the suit, if no satute controls. * * * There should be no difference, under our statute, between law and chancery, as to this."

There is no objection to this, but it does not say when the writ is deemed to be issued.

Giving Judge English's opinion any construction which is wished, it can have no conclusive weight for two reasons: (1) It is a dissenting opinion; and, (2) The case under discussion turned, not upon when the action commenced, but upon the effect of the failure of plaintiff to ask for an alias writ, for Judge English says, "it is true this suit was commenced within six months after plaintiff's account," etc.

It has been shown, therefore, not only that Lawrence *v.* Coal Co., *supra,* is not in point, but that the cases relied upon by the court are not in point, and were evidently not cited to sustain the point under discussion here.

Having exhausted all available cases on the subject, let us look at the etymology of the word "issue." Webster defines the verb as meaning "*to send out; to put into circulation,* as to issue money from a treasury or notes from a bank. *To deliver for use;*" and the noun as "*that which passes, flows, or is issued*

or sent out; as * * * (b) *ultimate result or end; event; consequence.*" And in another place, "*final outcome or result.*" The word is derived from two Latin words meaning "*to send out,*" "*to go out,*" and "*from.*" At its inception, where has the writ gone? Has there been "ultimate result or consequence?" or a "final outcome or result?" It can be readily seen that the word in English and its Latin stems, contemplate, not a partial doing, but a final disposal or completion, as far as the clerk is concerned. Now, can reason be found to sustain a theory to the effect that a mere filling out of the writ by the clerk is the completion and final disposal of that writ so far as he is concerned?—that his work in regard to the writ has reached its final result or end? It is submitted that it cannot for a moment be contended that the writ has been "sent out" or "put into use or operation" when there has been no further act done than that by the clerk of merely filling out the writ. Has it been "delivered for use" at this stage of the proceeding? If so, who has delivered it, and to whom has it been delivered? Has the "ultimate result or end" of the issuance of the writ been consummated? These questions answer themselves, and the opinion of the author, that the word means there must be a "sending out," in contradistinction to a mere "filling out," in a case like the issuance of a writ, is manifest.

It has been seen from the cases cited, that the great weight of authority bears out this contention, and it is respectfully submitted that by the word "issued" the legislature meant, and could have meant, but one thing—*the filling out of the writ by the clerk, and the delivery, either actually or constructively, of this writ to the sheriff, with a bona fide, absolute and unequivocal intention of having it served.*

H. CLAUDE POBST.

Tazewell, Va.

NOTE: Since the above article was written, the opinion in the case of Davis *v.* Roller (Virginia), 55 S. E. 4, has been handed down by the Supreme Court at Staunton. One of the contentions made by the counsel for defendants was "that no execution can be said to have issued upon a judgment unless it be, not only made out by the clerk, but placed in the hands of an officer

to be levied;" that in this case the only thing done was the filling out and attestation of the writ by the clerk, with his endorsement on the back as to a credit, followed by the words "To lie." The court said, "counsel cites authorities from other jurisdictions which seem to support this position. In this state, however, the law seems to be otherwise," and follows with a quotation from 4 Minor's Institutes (2nd. Ed.) 799, part of which is as follows: "If within the year an execution issues (which is understood its being made out and signed by the clerk, ready for the sheriff) other executions," etc. Another argument of the court was that such had been the practice throughout the state.

There may be a distinction between this case and the ones cited above, in that they turned on the construction of the word *issued* with reference to process to commence a suit, and the one under discussion was the issuance of an execution. However, the same rule would seem to apply to both. If it does, then the court, on the persuasive authority of a bare parenthetical statement by Mr. Minor, unsupported by adjudication or reason, and justifying Mr. Minor's position by calling attention to the fact that such had been the practice throughout the state, but in the same breath acknowledging that the law in other states is different, has gone further than any tribunal in this country, especially so under the facts in this case. Here an endorsement appeared on the execution "To lie." This would be one of the exceptional cases, discussed in 8 Va. Law Reg. 624, which all courts are unanimous in holding not good, on account of the fact that it lacks the *bona fide* intent that it shall be served.

H. CLAUDE POBST.